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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1034

JESSE L. PEARL AND MASSACHUSETTS BONDING AND INSURANCE COMPANY,

Petitioners,

vs.

THE COUNTY OF GARFIELD, NEBRASKA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

J. A. C. KENNEDY,
YALE C. HOLLAND,
G. L. DELACY,
B. F. ROSE,
Counsel for Petitioners.

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MAY IT PLEASE THE COURT:

The petition of Jesse L. Pearl and Massachusetts Bonding and Insurance Company respectfully shows to this Court—

(A) Summary Statement of the Matter Involved.

This is an action brought on a County Treasurer's bond by respondent in the District Court of Garfield County, Nebraska, against your petitioners, Jesse L. Pearl, formerly County Treasurer of Garfield County, Nebraska, and his bondsman, Massachusetts Bonding and Insurance Company.

The County seeks to recover County funds deposited in two banks by the said County Treasurer, pursuant to order of the County Board, which banks subsequently failed. The County seeks to hold the Treasurer as an insurer.

The statutes involved are a portion of the Depository Law of the State of Nebraska. Specifically they are Sections 77-2506, 77-2508, 77-2513, 77-2511 and 77-2512, Compiled Statutes of Nebraska, 1929.

Section 77-2506 provides that the County Treasurer must deposit the county funds in banks located in the County. It further provides that any such bank may apply to the County Board for designation as a Depository, and that the County Board shall act on such application and approve the Depository Bond of the applicant bank. The Treasurer is explicitly forbidden to deposit money "in any bank or banks other than such as may have been so selected by the County Board for such purpose."

Section 77-2508 provides that for the security of the funds so deposited "the County Treasurer shall require all such depositories to give bond for the safekeeping and payment of such deposits * * * which bonds * * * shall * * * be approved by the County Board."

This section provides also for security which may be given by a depository bank in lieu of bond, describing the various kinds and classes of securities which may be used for that purpose.

Section 77-2513 provides that "no Treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authority, if the bank has given bond."

Section 77-2511 provides that if the County Treasurer removes the County's money from any Depository so selected, he shall be deemed guilty of a felony and punishable by a fine of not to exceed $5000.00 or by imprisonment in the penitentiary for two years. (The money in question was

already in these two banks. After they had been designated as Depositories the Treasurer could not have taken the money out without violating the foregoing section.)

There were only two banks in the County (R. 15). Neither of these banks could furnish a Depository bond, nor could either of them furnish substitute security of the kind specified in the statute (R. 14-15). Both offered to deposit with the County commercial paper in lieu of a Depository bond. The County Board accepted their propositions and ordered the County Treasurer to deposit the County funds in these two banks (R. 15-16). The Treasurer obeyed the order (R. 16). It was not possible, under the circumstances, for him to "require" either of these banks to give bond. It was likewise not possible for him to deposit the money in any other banks in that County, because there were none. Nor was it possible for him to deposit the money in a bank outside of the County (or to keep it in a strong box) without violating the statute and the order of the County Board.

The Supreme Court of Nebraska held that the County Treasurer was an insurer and that he obeyed the order of the County Board at his peril.

(B) Proceedings Below.

Your petitioners demurred to the County's Amended Petition (R. 12). The Demurrers were overruled. The County demurred to Petitioners' Amended Answers. The Demurrer was sustained (R. 26), and judgment was entered in favor of the County in the sum of $20,751.69 as against Jesse L. Pearl, and $20,000.00 as against the Bonding Company, with interest at 6% from January 3, 1935 (R. 28-29).

Defendants appealed to the Supreme Court of Nebraska which Court sustained the judgment of the Trial Court in an opinion filed January 10, 1941, holding, in substance,

that a Treasurer is relieved from liability only where his deposits have been made in a bank designated by the County Board and which has given bond; that as to any deposit made where the bank has not given bond he is an insurer and absolutely liable therefor, even though the County Board may have ordered him to make the deposit, and even though he could not have made the deposit elsewhere without violating the statutes (R. 31-39).

Your petitioners filed a Motion for Rehearing upon the grounds, amongst others, that as construed by the Court, Sections 77-2506, 77-2508 and 77-2513 were confiscatory and violated the due process and contract clauses of the Federal Constitution (R. 39).

On March 1, 1941, the Motion for Rehearing was overruled (R. 67).

(C) Questions Presented.

1. A statute which (as construed by the Court), makes a County Treasurer an absolute insurer and holds him absolutely liable for the moneys of the County when all control over the same is taken out of his hands and vested in the County Board, confiscates his property, takes it away from him by processes over which he has no control, and is in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. A statute which (as construed by the Court), makes a County Treasurer liable on his bond (conditioned upon the performance by him of the acts required of him by law, where his only failure to comply with the law is his act of obeying an order of the Governing Body, disobedience of which order would in and of itself have been a violation of the same law, disregards the obligation of the bond contract and is in contravention of Section 10, Article 1, of the Constitution of the United States.